



PRIVATE ENTERPRISE FOUNDATION



Konrad
Adenauer
Stiftung

3rd SENSITIZATION SEMINAR

ON

ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

IN GHANA

COCONUT GROVE REGENCY HOTEL, ACCRA

3 MAY 2006

COLLABORATOR: GHANA ARBITRATION CENTRE

SPONSOR: KONRAD ADENAUER FOUNDATION (KAF)

Introduction

Over the years, concerns have been raised by business operators about the delays that their cases have to spend in the court before there are resolved. It has been established that this situation has a negative effect on the development and growth of the private sector. In recognition of this, the Ghana Arbitration Centre was established about nine (9) years ago not as a substitute for the judiciary nor a competitor in the delivery of justice but to play a complementary role in the administration of justice. In spite of its establishment, most business people are not aware or do not appreciate the existence of Arbitration as a viable, reliable, fair and expeditious system of dispute resolution.

Against this background, the Private Enterprise Foundation (PEF), with the kind sponsorship of the Konrad Adenauer Foundation (KAF) and in collaboration with the Ghana Arbitration Centre has planned a series of regional sensitization seminars to create awareness and educate business people on Arbitration and Alternative Dispute Resolution mechanisms. The third regional seminar which attracted forty-three (43) participants was held on Wednesday, 3rd May, 2006 at the Coconut Grove Regency Hotel, Accra.

Welcome Address

Welcoming the participants on behalf of PEF, Mr. Jesse Clottey, Director in charge of Technical Services at the Foundation, informed the participants that the seminar was the third in the series of seminars to be organized across the country for business operators, after the first meeting held at Elmina on 30th November, 2005 and the second on 28th March, 2006 at Kumasi.

He mentioned that the private sector in Ghana is responding gradually to all the challenges that are associated with the existence of the right enabling environment for good and profitable business. According to him, one of such challenges is the long periods spent at the courts before legal issues are resolved. In order to reduce such long delays in the delivery of judgement through the courts system, the private sector has sought the assistance of the Ghana Arbitration Centre and the Alternative Dispute Resolution approach to consider an alternative system.

He added that most people including business operators, however, are unaware of, or do not understand very well, the existence of the Arbitration Centre and the new attention being drawn to Arbitration and Alternative Resolution.

“We are very lucky to secure the presence of Mr. Sam Okudjeto, a leading Lawyer in Ghana and first vice Chairman of the Ghana Arbitration Centre to be the Chairman of this seminar”, he said.

He acknowledged the immense support from the Konrad Adenauer Foundation (KAF) in the organisation of these sensitization seminars.

He finally urged the participants to share the ideas they will gather with those who did not get the opportunity to be at the meeting, in order to educate and encourage the use of Alternative Dispute Resolution in the settlement of business disputes.

Chairman's Remarks

In his opening remarks, Mr. Sam Okudjeto said as one of the proponents of Alternative Dispute Resolution in Ghana, he was happy to be part of the seminar. He said people are often not aware of ADR because of the lack of understanding these people have on the usefulness of the alternative dispute resolution mechanisms available to them.

He mentioned that people go to court because they believe that that is the place where their dispute could be resolved. He added that the judgement given by the Judge leads to acrimony among the parties that went to court. According to him, such a situation is not found in ADR processes and he informed the participants that they were blessed to have renowned legal persons with experience in ADR process to lead them during the seminar.

Finally, he thanked KAF and DANIDA for sponsoring the reform of the Court system. He introduced the Chairman of the Ghana Arbitration Centre, Nana Dr. S. K. B. Asante.

Statement by KAF

In a statement read on behalf of the Resident Representative of the KAF by Mr. Berne Guri, Senior Programmes Officer, Mr. Klaus D. Loetzer said the Foundation is one out of the German Political Foundations that work in Ghana with the objective of promoting the ideals of good governance across the globe.

He added that the KAF supports economic and social reforms of government, strengthens the role of Parliament, promotes broad based participation of the citizenry in decision making through decentralisation programmes and also supports the promotion of indigenous traditional institutions.

He mentioned that since the last forty (40) years, KAF has been working to fulfil its core mandate of contributing to the economic and social development process of the country.

According to Mr. Mr. Loetzer, the Foundation has over the years worked with a number of organisations and institutions such as PEF, Christian Mothers' Association, Faculty of Law of the University of Ghana, Ministry of Regional Cooperation and NEPAD, Ministry of Interior, among others, in several areas like socio-economic and development issues, human rights issues, development policy issues as well as security issues.

Finally, he invited participants to join the KAF to celebrate forty years of promotion of democracy and good governance in Ghana this year.

Statement by the Nana Dr. S. K. B. Asante

Nana Dr. S. K. B. Asante, Chairman of the Ghana Arbitration Centre in a statement informed the participants that against the backdrop of the slow nature of settlement of business cases at the courts, a cross section of senior members of the Ghanaian legal profession, nine years ago, mooted the idea of establishing an arbitration institution in Ghana to serve as a complement in the administration of business disputes. Since then, the Centre has been at the forefront in advocating the use and application of arbitration and other ADR processes as an effective means of resolving commercial, construction, investment and other civil disputes, he added.

He mentioned that in the country's quest for accelerated economic growth over the last twenty years, the Government employed various interventions to attract domestic and foreign direct investments into the country. However, he said, this burning desire failed to address the complex process and procedures for adjudicating disputes, particularly investment, commercial and construction disputes in the country.

According to him, experience has shown that investors prefer destinations where their investment and commercial disputes would be fairly and expeditiously settled. This criterion, he said, serves as a major determinant of investment flows. He added that it is generally recognized that investors almost invariably insist on the settlement of their investment or commercial disputes through arbitration or other ADR mechanisms.

Nana Dr. Asante pointed out that, notwithstanding the recent establishment of the commercial court to resolve commercial disputes, there is still ample room for more expeditious methods of settling disputes since the courts are still inundated with cases. He recognized the effort by the judiciary in incorporating ADR in the normal judicial process.

Presentations

Making his presentation, Mr. Kwami Tetteh, defined Arbitration as "a reference of a dispute between two or more parties to a third person other than a court in a determination in a judicial manner".

Giving an overview of the background to the development of ADR in Ghana, he said the Arbitration Act can be traced to England. He mentioned that during the 1690's, the practice of arbitration evolved around the world and the business community sought to use it as a means in settling disputes. He added that as the practice became more popular, the courts came into support and formalize the practice.

He told the participants that Ghana's arbitration law was founded on the English law system. According to Mr. Tetteh, before the emergence of the modern-day arbitration practices, there were traditional ways of resolving disputes. He added that the chiefs had arbitration sessions in their palaces. He noted that the difference between the traditional and the judicial ways is that the latter is meant to resolve business disputes.

Is there really a compelling reason why one must go to arbitration?

He said because of the defects in the current judicial system such as long delays of cases in the courts before they are heard, businessmen should consider adopting arbitration. In order to be able to refer a dispute to arbitration or any other ADR process, there is the need for an arbitration clause, he noted. The arbitration clause, he explained, is a provision which is stated explicitly in a contract to the effect that “in the event of a dispute, the matter shall be settled through arbitration”. This provision therefore becomes binding on the parties to the contract.

Advantages of Arbitration

- § The choice of appointment of the arbitrator lies with the parties
- § Arbitration process engages experts
- § The process is strictly private. Thus, the public is not entitled to listen to the proceedings. Business secrets are therefore preserved.
- § The atmosphere is informal
- § There is a pre-trial hearing whereby the proceedings are planned. This gives a layout for the way forward.
- § The parties are in control of the process. That is, they decide how the arbitrator should go about the proceedings.
- § The strict procedural rules of court do not apply.
- § Subject to certain exceptions, awards are final.

Disadvantages of Arbitration

- § Although the process is flexible and convenient, it is a bit costly. The Litigation could be sometimes very costly in terms of time.
- § Since the process is based largely on the cooperation of the two parties, a party can intentionally delay the appointment of the arbitrator.
- § It is not all matters that can be referred to arbitration.

Enforcement of award

He told the participants that before an arbitration award can be enforced, it must be registered at the court. He said the court may or may not register the award. If it is not registered, then it cannot be enforced.

Balance of pros and cons of arbitration

Analyzing the balance between the pros and cons of arbitration, Mr. Tetteh said that arbitration has come to stay and businessmen cannot turn away from it. He added that with the increase in cross-border trade in recent times, businessmen should ensure that they include an arbitration clause in their contracts.

He mentioned that weighing the pros and cons of arbitration, he believes that arbitration is the best means of settling disputes amicably. He added that certain regulations such the National Communications Authority Act, Ghana Investment Promotion Act, Labour

Act, High Court Rules, etc. have made provision to refer disputes to arbitration and other ADR processes like Mediation and Negotiation.

2nd Presentation

Presenting his paper on Alternative dispute resolution and its potentials in Ghana, Prof. Kofi Quashigah of the Faculty of Law of the University of Ghana, examined the attempt by the judiciary to institutionalize the ADR process in the judicial process in Ghana. He said in response to the incessant complaints about the delays in the judicial system, the Government commissioned a project under the “Private Sector Development Project” that sought to identify areas of the Ghanaian Legal System that had the tendency to constrain commercial development. He mentioned that one of the areas of the study under the project was on Administrative Law Procedures/Arbitration and Alternative Dispute Resolution Mechanisms. He said the recommendation of the study was that ADR holds the key to the improvement of dispute resolution system in Ghana.

He further noted that the Attorney-General in the year 1998 set up a Task Force on ADR, made up of members drawn from various sectors of the society. He said that one of the outcomes of the functions of the task force was the eventual formulation of a Bill on ADR, which has remained a Bill since then.

Prof. Quashigah noted that the legal system in Ghana has for a long time recognized the importance of the ADR process as a dispute resolution mechanism. He said the legal system has implicit provisions for the use of ADR Mechanisms when the need arises. He cited the Courts Act 1993, Act 459 as an example, mandating the courts as institutions of justice to adopt any ADR process that would suit the particular case.

Moreover, he mentioned that various legislations specifically recognize and mandate the utilization of some ADR processes. Such legislations include the Ghana Investment Promotion Act 1994, Act 478; The Arbitration Act 1961, Act 38; Labour Act 2003, Act 651; Free Zones Act 1995, Act 504; The Copyright Law 1985, PNDCL 110; etc.

Prof. Quashigah mentioned that there are alternatives to formal institutions like going to court, apart from Arbitration, which provide many of the same objectives and remedies that the court can, such as Negotiation, Conciliation and Mediation. He explained these as follows:

Negotiation

This is a discussion between two or more disputants who are trying to work out a solution to their problem. The parties acknowledge that there is some conflict of interest between them and think they can use some form of influence to get a better deal, rather than simply taking what the other side will voluntarily give them.

Conciliation

This is a problem-solving process in which a third party, called a conciliator, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions and pointing out misperceptions. The conciliator may or may not be totally neutral to the interests of the parties.

Mediation

This is a flexible and highly varied process in which a mediator gets involved in a conflict between two or more people to help them resolve their dispute, but has no power to bind the parties. The mediator is primarily a “process person”, who helps the parties to define the agenda, identify and reframe the issues, communicate more effectively, find areas of common ground, negotiate fairly and hopefully reach an agreement.

Recommendations

1. Businessmen should ensure that their Contracts agreements include an arbitration clause;
2. The Arbitration agreement should also be reduced to writing;
3. Businessmen should not attempt to draft an arbitration agreement.
4. Participants were urged to engage the services of a legal practitioner to draft the agreement
5. Businessmen should always consider ADR before proceeding to court;

Appendix:

List of Participants

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|-----------------------------|---|-------------------------------------|
| 1. Alexander Williams | - | Cal Bank Ltd |
| 2. Prof. Kofi Quashigah | - | Faculty of Law, University of Ghana |
| 3. Agyare Baokye | - | PEF |
| 4. Martha Bediako | - | Ghana Insurers Association |
| 5. Gabriel Glover | - | “ |
| 6. Nana Dr. S. K. B. Asante | - | Ghana Arbitration Centre |
| 7. Emmanuel Martey | - | Ghana Institute of Surveyors |
| 8. Sam Okudjeto | - | Ghana Arbitration Centre |
| 9. Mansa Amoa Awuah | - | Advertisers Association of Ghana |
| 10. Dawn Zaney | - | Standard Chartered Bank |
| 11. Matthiaa Mayr | - | KAF |
| 12. Maud Griffin | - | Association of Road Contractors |
| 13. Sowah A. Yunus | - | Ghana Plumbers Association |

14.	Dan Oko Newton	-	“
15.	Joseph Awuantumgo	-	Ghana Ass of Women Entrepreneurs
16.	Emmanuel Coompon	-	SIGNOTRADE Ltd.
17.	Bern Guri	-	KAF
18.	Jesse Clottey	-	PEF
19.	Eward Nyarko Anokye	-	Hotel Association of Ghana
20.	Afua Asante	-	Unilever
21.	Joseph K. Amoah	-	Ghana Employers' Association
22.	Edward Kwapong	-	Ghana Commercial Bank
23.	E. Awotwi-Pratt	-	Cal Bank Ltd
24.	S. Kwami Tetteh	-	Teven & Co.
25.	G. V. K. Amenyihe	-	Ass. of Building & Civil Eng. Contractors
26.	S. Kuwornu	-	Advertisers Association of Ghana
27.	Agyakwa Ayisi Addo	-	PEF
28.	Isaac Owusu-Mensah	-	KAF
29.	Christiana Adjei Acquah	-	PEF
30.	Moses Agyemang	-	PEF
31.	Brenda Ofori	-	VRA
32.	David Obeng	-	Nana Brentuo Ltd.
33.	David Nutakor	-	Ghana Institute of Freight Forwarders
34.	Emmanuel Amofa	-	Ghana Arbitration Centre
35.	Ebo Hewton	-	Association of Road Contractors
36.	Emma Asiedu (Mrs)	-	Ghana Civil Aviation
37.	Yvonne Osei-Gyan	-	Standard Chartered Bank
38.	E. Nuworzah	-	Consumers Association of Ghana
39.	Marie Azanbon	-	“
40.	Ahmed A. Salifu	-	Indigenous Salt Association
41.	Alhaji Sahabi	-	“
42.	Alhaji Abdul Karimu	-	“
43.	Alhaji Shehu	-	“